



Decision

Matter of: Universal Service Fee Surcharge

File: B-279796

Date: January 4, 1999

DIGEST

1. Telecommunications vendors charge the Army a Universal Service Fee to recover the vendors' universal service contributions, required of telecommunications carriers by federal law. Because the universal service contributions arise as a result of federal, not state, law, the federal government's constitutional immunity from state and local taxation does not arise, and would not prohibit payment of the fee.
2. A pending legal challenge to the requirement of the Telecommunications Act of 1996 that telecommunications carriers make universal service contributions does not compel a conclusion that the Army may not pay Universal Service Fees assessed by carriers to recover, as a cost of doing business, the amounts of their contributions. Presently, no court has held the fees to be illegal, and the United States is vigorously defending the legality of the requirement.

DECISION

A disbursing officer of the Army at Fort Sam Houston has requested an advance decision concerning the propriety of paying a Universal Service Fee, a surcharge that communications vendors have added to Fort Sam Houston's invoices for telecommunications services. Although this matter is complicated by pending litigation, we have no objection to the Army's payment of the fee if payment is required by its existing contracts and is consistent with the carriers tariff.

Background

The Telecommunications Act of 1996 requires that "every telecommunications carrier that provides interstate telecommunications services shall contribute . . . to the specific, predictable, and sufficient mechanisms" established by the Federal Communications Commission (Commission, or FCC) "to preserve and advance universal service." Pub. L. No. 104-104, § 254(d), 110 Stat. 56, 71-73 (1996). The Act defines "universal service", generally, as a level of telecommunications services that

the Commission establishes periodically after taking into account various considerations, including the extent to which telecommunications services are essential to education and public health and safety. Id., § 254(c)(1). The Commission uses the carriers' universal service contributions to subsidize services to low income consumers, as well as advanced telecommunications for schools, libraries, and rural health care providers.

The Commission bases contributions on the carriers' end-user revenues. The carriers calculate their contributions by multiplying their end-user revenues by the universal service contribution factor set by the Commission. Although the Commission has specifically declined to direct the carriers to recover their contributions through a surcharge on their customers, it did not prohibit surcharges. Federal State Board on Universal Service, Report and Order, 12 F.C.C. Rcd. 8776, 9211-12 (May 8, 1997). A number of carriers have chosen to impose them in order to recover from customers, as a cost of doing business, the amounts of their contributions.

Referring to the Commission's decision not to require carriers to pass their contributions on to customers through surcharges, the disbursing officer asks whether he may pay the surcharge, or Universal Service Fee, assessed Fort Sam Houston by its communications vendors. Noting our decisions addressing 9-1-1 emergency telephone surcharges, he questions whether the federal government is exempt from paying the surcharge, which he compares to the 9-1-1 surcharges, as a tax assessed against customers.

Analysis

Our 9-1-1 decisions are inapposite here. The 9-1-1 cases involved taxes assessed under state law. The United States and its instrumentalities are immune from direct taxation by state and local governments. U.S. Const. art VI, cl. 2. Hence, in our 9-1-1 decisions, we found the federal government, as a consumer, exempt from paying state and local taxes assessed directly against the United States as an end user. See B-265776, Nov. 29, 1995; B-254628, Apr. 7, 1994; B-254712, Feb. 14, 1994. (On the other hand, when a state or locality assesses a tax against a provider who simply passes that amount on to its customers as an added cost of business, the federal government may pay its provider the costs the provider charges. Id.) Because the Universal Service Fee at issue here is intended to recover the carriers' universal service contributions established under federal, not state, law, constitutional immunity does not arise, and would not prohibit payment of the fee.

This matter is complicated by pending litigation in which carriers challenge the constitutionality of the Commission's action requiring universal service contributions. A number of carriers, along with several states, have petitioned the Fifth Circuit Court of Appeals for review of the Commission's order. Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir., filed June 25, 1997). Among the arguments raised is that the contributions required by the Commission represent an

unlawful tax and that the Congress exceeded its constitutional authority in delegating taxing power to the Commission. In the litigation, the United States asserts that the universal service contribution does not constitute a tax, but merely a mechanism to preserve and advance universal service. Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-262, 94-1, 91-213, 95-72, FCC 97-240 at ¶ 262 (Dec. 30, 1997). That litigation is pending before the Fifth Circuit.¹

The pending legal challenge to the requirement that carriers make contributions does not compel a conclusion that the Army (or other agency) may not pay the fees assessed customers by the carriers as a cost of providing telecommunications services. The United States, in reply to the carriers' arguments, vigorously maintains the legality of the requirement. Nor may we presume the unconstitutionality of a congressional enactment. U.S. Const., art. I, § 8. Currently, no court has held that the carriers' universal service contribution is an unconstitutional tax. We will not conclude that agencies of the United States may not pay a fee because of the pending legal challenge to the contribution that the carriers intend that fee to recover. Accordingly, we have no objection to the Army's payment of fees, such as the Universal Service Fee, that carriers assess to recover the amount of their contributions, if payment of such fees is otherwise required by its contracts with its carriers and consistent with the carriers tariff.²

We recognize the possibility that the Fifth Circuit may agree with the carriers and reverse the Commission's order requiring the carriers to make the contributions.

¹See GAO/RCED/OGC-98-172R, May 1998, which summarizes the arguments raised by the various parties to the litigation.

²As a basic proposition, appropriated funds are only available to pay lawful obligations of the United States. 31 U.S.C. § 1301(a). Thus, if the Army's contract does not obligate it to make these payments, or if such payments are not consistent with the carrier's filed rates, see American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818, 819 (D.C. Cir. 1980), RCA Global Communications Inc. v. FCC, 717 F.2d 1429, 1430 (D.C. Cir. 1983), appropriated funds would not be available to make these payments. Given the general nature of the questions posed, we are not in a position to factually resolve any contract and tariff issues.

The possibility of the court, in the future, agreeing with the carriers, and the resulting possibility of refunds of Army payments to the carriers, would not by itself subject the disbursing officer to liability for having made an improper payment. As long as the fee is otherwise properly payable at the time the officer makes payment, he may do so without concern as to the outcome of the pending litigation and the resulting consequences.

Comptroller General
of the United States